

SHUFELDT *Compliments of Dr. Shufeldt*

NEEDED REVISION OF THE LAWS OF
MARRIAGE AND DIVORCE IN THE
UNITED STATES.

✓
BY. DR. R. W. SHUFELDT, U. S. ARMY; MEMBER OF THE
MEDICO-LEGAL SOCIETY OF NEW YORK CITY, ETC.

As in so many other social institutions of man's creation, the laws governing that of marriage, as well as those enacted to enable the parties to dissolve this contract, or the laws of divorce, are of his own making, and consequently they may, or they may not be the best that could be framed in these premises for the accomplishment of the ends which they have in view. Doubtless in many instances it can be shown that they are not the best; and it happens, as it does so often elsewhere, that the laws of man's enacting work distinctly at cross purposes with existing natural laws governing the very state, which by his eminently artificial and unscientific ones, he expects to establish. Often too, it is, that these natural laws are either very imperfectly known or understood: or if they are, they are entirely ignored. If we take the institution of marriage for example, as it is established in this and in other countries, it can easily be shown that as time passes on, the laws and the statutes relating to it are constantly added to, and very frequently become more and more complicated and consequently cumbersome and ineffective. But in the meanwhile the natural laws remain the same; and as society grows, the useless and burdensome legal code and the statutory laws are evaded as much as is possible; and in due course the former take precedence; and a revolt is gradually inaugurated against the

LIBRARY
SURGEON GENERAL'S OFFICE

MAY-20-1898

604

artificial restraints and the restrictions of the latter. From a biological point of view then, or what may be otherwise considered from the standpoint of the natural law, man is but a representative of a family, (*Homidæ*) of the Vertebrata, and so just as much under the operation of certain physiological and psychological demands of his organization as is any other animal of the group. This fact, it would seem, is more and more being lost sight of—by society on the one hand and our law-makers upon the other—until the time has now arrived when the true relations, the natural relations, of the two sexes have been so masked and distorted by legal machinery, as to be completely subordinated. For, fundamentally speaking, the prime object of the institution of marriage is to afford the periodical opportunity for the satisfying of the imperative demands of the procreative instinct and the perpetuation of the species. Among the very lowest types of men this constitutes the sum total of the relation of the sexes, as it does in the case of all other forms of vertebrate life. During the evolution of man, however, many other relations have entered into his estate to very much complicate this simple demand of Nature. Among these we have the desire on the part of many to establish the home; others marry for money and for social position; many women marry for a home; some enter the state for natural aid and companionship, others to perpetuate a family name, to retain properties of great value within the family control; and for a host of other reasons of all degrees of importance. So imperative have many of these factors become, or the various combinations of them, that what nature demands, both physiologically and psychologically stands in danger of being entirely lost sight of; and the consequences are now being quite universally felt. For ages past, too, matters have been made decidedly worse by the hand which

priesthood has been permitted to take in the celebration of marriage, and thus forever attaching the superstitious idea of sacredness to it, and weaving all through it the baneful question of creed and of orthodoxy. What can be more absurd than to grant to the members of any calling the authority to make valid a contract (of so vital an import), that, in the event of a mistake having been committed, they are powerless to correct it. The entire matter should be taken out of the hands of the church, and brought within the jurisdiction of the legal profession; and the contracting parties should be made duly to enter into a civil contract, which latter may be drawn up to meet the special requirements of any particular marriage. It moreover should be made perfectly explicit and binding, and bear the certificate that the contracting parties are free from all mental and bodily defects, or disease of any kind, either by heredity or acquired, which might in any way give rise to future unhappiness, or be transmitted to their progeny.

This certificate should be testified to and witnessed by no less than three physicians. All questions of property, of the obedience of the wife, and indeed all matters which are now so well known to give rise to dispute after marriage, may in such an instrument be understood prior to the signing thereof. Again in the event of the marriage proving an uncongenial one, this contract could likewise specify a full agreement in reference to support, division of property, control of children (if any), in case the parties at any time desired to sever the bond. By such an arrangement as this, simply hundreds of harrowing divorce suits could practically be kept out of the courts altogether, by the married pair being held to the requirements of their legal contract. In Norway and Sweden, this is partially accomplished by trial or by probational marriages; and a

very excellent institution they are, falling as they do more within the operation of natural laws. Parties here may marry under definitely prescribed statutes, (in regard to property and children) for a period of two years or more, and then if the marriage in that time be proven to be a true one, it may by a second ceremony, be legalized and rendered permanent. An enormous advantage is gained by these trial marriages, as they at least, will allow of a test of the physiological and psychological organizations of the pair; in other words, an opportunity *to know* whether they be sexually affined or not, and that their *temperatures are compatible*. In short, an "incompatibility of temper," means nothing more than the vernacular for the binding together of inharmonious psychological elements of organization. Rupture follows sooner or later, and common minds place it upon entirely different grounds. These usually are that one or both parties are laboring under some form of immorality of mind, and that their natural polygamous instincts incline them to frequent change. This I believe to be true only in a very small proportion of cases, although man by nature is a polygamous animal. Trial marriages are eminently sensible in many other particulars, as, for example, one of them is likely to demonstrate the possibility or the impossibility of the pair having children, and whether their progeny are likely to be sound and healthy or the reverse. But above all else, they *permit* a recognized opportunity to prove whether the mated ones are sexually affined in all particulars;—anatomically, physiologically and psychologically. If the truth could be known, fully half the unhappy marriages in this country, I believe, are due to the fact that the parties are not harmoniously affined, sexually; and if *this* be the case, then it matters not how favorable all the remaining factors or features of the marriage may be, unhappiness can only re-

sult. This will either terminate in a dissolution of the bond of wedlock, or the far less sensible course of "making the attempt to smooth the thing over," just as though that were possible when the matter is some radical and permanent defect in organization exemplified in either one or both of the parties.

Thus far, to sum up, then, I would suggest that in reference to marriage as an institution, the principal features in it which now stand in need of improvement in the United States, are, (1), That its solemnization be entirely taken out of the hands of the priesthood and church, and relegated to the legal profession; (2) That it be made a civil contract, explicit in detail, and defining terms of divorce in the event that a dissolution of the contract is subsequently desired; (3) That legal precautions, in the form of medical attests, be taken to ascertain that the parties are free from both hereditary or acquired disease, in order to obviate the danger, as far as possible, of propagating the same through their descendants; and (4) That trial or probationary marriages be instituted, with the enactment of the proper laws governing them, and that these laws be framed with a due regard for the mental, moral and physiological organization of the pair to be married.

In the United States, the ceremony of marriage, and the persons empowered to perform it, is tolerably uniform, while upon the other hand, constant conflict reigns, owing to the interstate inconsistencies in legislation about divorce, to an extent that is absolutely appalling, and the rulings and legal literature upon the subject would make a library of thousands of volumes; so it would be, in a brief paper like the present one, simply out of the question to discuss any of these harm-breeding inconsistencies here. Be it sufficient to say, that the most fortunate event which could happen would be an annulment of *all*

the divorce laws, and to have an *uniform and scientific system* enacted by Congress for the guidance of the whole country. Indeed, we have come to a pass where some such a step seems to be imperative, or else the people will cast off the yoke entirely by common consent, as it once happened in Roman history, where marriage came to be regarded as a voluntary union, and divorces could be secured at any time, merely by the agreement of the wedded parties. Then, as with us now, immorality only stepped in, and became dominant, when, at "a later period, Justinian enacted that persons dissolving a marriage by mutual consent should forfeit all their property, and be confined for life to a monastery, which was to receive a third of the forfeited property, the remaining two-thirds going to the children of the marriage. This severity, so much at variance with the Roman spirit, indicates the growing power of the clergy, (*ut non Dei judicium contemnatur*).” (Hunter’s *Roman Law*, p. 500).

The effect of the complete abolition of the divorce laws has already been discussed by me in *The Humanitarian* for May, 1896, (p. 360), where it was shown that a recognized system of concubinage is the result where that obtains. But concubinage does not consist in immorality—indeed, it is diametrically opposed to it, and its best remedy. The moral standard in any country is never so good as when that country either makes divorce extremely easy, as was the case in Rome, or denies it *entirely*, as it is now enacted in the State of South Carolina. And, *vice versa*, the morals of a country were at their lowest ebb, where the tribunals of that country insist upon the obtaining of a divorce to be a legal procedure, fraught with the greatest difficulty, expense, and hardship. It is then that bigamy, adultery, the greatest enemy of the true home, and prostitution, the handmaiden of drunkenness, vice, and disease,

step in, and militate against the good morals of a country. These are but other examples; however, where man in his ignorance ignores the imperative laws and demands of nature, and essays to regulate matters by the enactment of a drumhead code, in a complete conflict with them. Neither public decorum nor individual comfort is served or benefited, and experience shows that this has invariably been the result.

Here in America we are moving with extreme rapidity along certain lines; and the student of our social organization must indeed be blind if he fails to recognize the revolution which is now in progress, involving the entire question of marriage and divorce.

It constitutes the constant theme of discussion in the majority of our best magazines; lecturers bring the matter before large audiences continually; men and women discuss it in a way among themselves that it never has been discussed in the country before; and the illustrated papers, devoted to humor and to cartooning never let a opportunity pass without showing up the inconsistencies of marriage as now ordered, and the frivolities indulged in by those contemplating wedlock. Our *daily* papers absolutely reek with their long array of accounts of divorces, of adulteries, of bigamies, of elopements, of infidelities, and of many more kinds most various, but all going to point to the fact that there is something *radically wrong* somewhere.

The distinguished novelist, Marion Crawford, has recently taken up the subject in the *Century Magazine*; but the present writer in no way agrees with the conclusions arrived at by him. In calling attention to the "Increase of Divorce" in the United States, he says: "Every one can remember how divorce was spoken of and thought of until very recently; Within a few years it was deemed to

be something very like a disgrace, and certainly a profoundly cynical and immoral proceeding. To-day we can most of us count in our own acquaintances half a dozen persons who have been divorced and been married again.

* * * * In what calls itself society there seems still to be a prejudice against a third marriage for divorced persons; but at the present rate of advance in civilization this cannot last long; and the old significance of the word "marriage" will be quite lost before our youngest grandchildren are dead—in other words, by the end of the next century at the farthest.

"There are various forms of honorable political dreaming and of dishonorable political mischief-making now-a-days, which we are accustomed to call collectively "socialism." Most of these rely for their hope of popular success upon their avowed intention of dividing property, and of preventing its subsequent accumulation. Marriage is an incentive of such accumulation, because it perpetuates families, and therefore keeps property together by inheritance. Therefore all forms of socialism are at present in favor of divorce, as a means of ultimately destroying marriage altogether. A proverb says, that whosoever desires the end, desires also the means. There is more truth in the saying than morality in the point of view which it expresses. But there are some who desire neither the means nor the end to which they lead; and a struggle is coming the like of which has not been seen since the beginning of the world, and of which we who are now alive shall not see the termination."

Very likely the socialist is in favor of divorce, and the ultimate abolition of marriage as now constituted; but if Mr. Crawford will take the back numbers of a month of any of our large dailies, and will carefully analyze the hundred and one divorces granted, which he will surely

find therein, the fact will at once become evident to him that socialism has, as yet at least, but little or nothing to do with the enormous increase of divorce in the United States. Upon the whole we are a right-thinking and a right-acting people; and moreover, we think a good deal and act largely in harmony; and the increase of divorce, and the ease with which it is obtained is doubtless a sensible step in the proper direction, leading to something better in our organization as a people.

Not long ago the writer was present at a very distinguished gathering of men here in Washington, some three hundred or more being present. Most of these gentlemen were authors of international reputation, and represented nearly every line of thought, and filled positions of marked distinction. Few were advocates perhaps of the more tempered propositions of our modern socialistic school, but the majority certainly were not. A friend near to me called my attention to the fact of the number present who were known to be living unhappily with their spouses; several had separated; one was in court with a divorce suit; two within conversational distance were divorced from their first or their second wives; and a dozen or more men past fifty, modern philosophers in their days, had never married at all. Surely socialism would offer here but a poor solution for a state of affairs, which in a similar body of men, twenty years ago, would absolutely be an unheard-of one; for at that time the divorced man was in the public eye some sort of a blackleg, instead of being a person endowed with the best of good sense, as he is now generally regarded.

Honest, pure, and true love of a noble man for a worthy woman, and of a noble woman for a worthy man, is no rarer in the world to-day than it has been at any time in its history; through all the vicissitudes of man's career on

earth, we have every reason to believe that this, the sovereign queen of all the emotions, has never changed, and never will for many an age to come. Love would exist in the world to-day, just as pure and just as enduring, had man never *invented marriage*; and, moreover, the instinctive love which the genuine mother has for her children, would to-day be fully as strong, and she would with undiminished fearlessness be as quick to defend them against danger, or even die for them, had this invention never been instituted. Hosts of fathers too, would likewise have been found with the corresponding paternal instincts quite as well pronounced, had they not been ligatured to their mates by the permission of the priesthood. In short, had marriage never come into being, there would have been to-day just as much real love in the world, and probably ten thousand fold less crime and disease. Truly affined mates would have remained faithful to each other as long as life lasted, as do those who *chance* to be *truly married* at the present time. Criminal abortion would have undoubtedly been the rarest of occurrences, instead of one of fearful frequency, being performed perhaps hundreds of times every month in any large city, where the present form of christian marriage is in vogue. The polygamous instincts of man, and the corresponding ones in a certain proportion of women would probably have been exercised precisely as they ~~are~~ now, but as these are inborn and natural they would have been very differently regarded. It is only when men attempt to improve upon nature that crime, disease, and unhappiness, without end, steps in.

Mark, you, I weigh my words well, when I say that a good part of the alcoholism now brutalizing mankind, the curse of prostitution and induced abortion, with the terrible train of diseases that follow in their wake, a large proportion of the cases of insanity and of psychopathia sexu-

alis, are, and much else besides, due entirely to the perversion, the bridling, and the distortion of the normal sexual instincts of our race, and this has been in history principally accomplished through the false notions and the operations of the Church and the Courts of Law. These operations, however, have very rarely been done with malice aforethought, but rather through the promptings of superstition, the dictates of ignorance and lack of knowledge of natural laws. Within recent years science has shed a perfect flood of light into many of the darkest recesses of the mind of mankind, which has resulted in a better understanding of a great deal that was before obscure and very imperfectly known. No abatement is evidenced along such lines in these days, but rather a marvelous acceleration everywhere ; and when our conceptions of what that life means, and we appreciate more fully that, after all, nature is really the safest guide in everything, why then will quickly come about an improvement and a change in the now false attitude that the sexes are compelled to assume toward each other in all that pertains to affairs conjugal.

all, etc. and much else besides due entirely to the pervasion of the feeling and the distortion of the normal sexual instincts of our race, and this has been in history pretty fully accomplished through the false notions and the operations of the Church and the Courts of Law. These operations, however, have very rarely been done with real ice, notwithstanding but rather through the promptings of self-interest, the mistakes of ignorance and lack of knowledge of natural laws. With recent years science has shed a perfect flood of light into many of the darkest recesses of the mind of mankind, which has resulted in a better understanding of a great deal that was before considered very mysterious. No scientific law is ever deduced about such things in these days, but rather a careful and accurate study of every where; and when our conceptions of what man the means, and we appreciate more fully that after all, nature is really the safest guide in everything, why then will quickly come about an improvement and a change in the laws that attend that the sexes are combined in the same towards each other in all that pertains to their conjugal life.